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SENSITIVE

DEPARTMENT PASS USTR FOR BWEISEL AND TPOSNER
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E.O. 12958: N/A

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SUBJECT: WITH TEMPORARY PATCH, THAILAND RESUMES APPROVING
US SERVICES INVESTMENTS UNDER AMITY TREATY

1. (SBU) Summary: On January 25 MFA PermSec KRIT told the Ambassador that, in exchange for the US willingness to consider new language that would provide "greater comfort" for Thailand in the event of a WTO challenge to its provision of better-than-MFN treatment of US services investors, Thailand will immediately resume approval of AER-related US services investment applications. The Ambassador agreed, hence US services applications are again being approved. The RTG has asked that the effort to find mutually acceptable language have an end-of-February deadline.

2. (SBU) This arrangement provides a temporary (5-week) patch to our immediate problem and as such is welcome. However, this incident serves as a reminder that the AER's long term prognosis is terminal. Key provisions of the AER are inconsistent with contemporary trading arrangements to which both Thailand and the US are signatories. Our best hope for continuing our preferential rights in services investment in Thailand is the conclusion of an FTA. If the FTA falters, U.S. services investment rights in Thailand are likely to revert to the GATS and its MFN provisions. Prospective U.S. services investors need to be aware of this fact. End Summary.

3. (SBU) In a January 25 meeting, MFA Permanent Secretary Krit told Ambassador Boyce that, while the RTG believes its January 25, 2004 diplomatic note terminating two articles of the Treaty of Amity and Economic Relations (AER) was valid, the Thai Cabinet had agreed, as an interim measure, to "resume" the AER's "status quo" if the USG would agree to discuss new language for an exchange of notes to provide the RTG "greater comfort" in the event Thailand were brought before WTO dispute resolution because of the AER. (Note: By "resume the status quo", Krit means the resumption of RTG acceptance and approval of US services investments under the provisions of the AER. The RTG stopped approving applications o/a January 1 of this year -- para 9.) Krit asked the USG to agree to an "end of February timeframe" for agreeing to the new language. Ambassador Boyce agreed to this proposal, carefully noting that we would be willing to consider language providing "political comfort" to the RTG, but not anything which would create a legal commitment on the part of the USG. Krit replied that these two concepts might have some overlap. The PermSec promised that by the morning of January 26, US companies would again have their applications for registration in Thailand under the terms of the AER accepted and approved by the Ministry of Commerce.

4. (SBU) Krit said that he did not have modified language to propose at this time: "We (the RTG) will have to consult among ourselves before we are ready to propose specific language."

5. (SBU) The PermSec attributed the temporary resolution (the "turning point") of this matter to a January 18 telephone conversation between FM Kantathi and AUSTR Barbara Weisel during which the basic outlines of this proposal were discussed. The FM subsequently briefed the Cabinet, which approved and, said Krit, empowered him to convey the proposal to the Ambassador. Krit admitted that "circumstances and efforts on our (Thailand's) part" have reduced to "minimal" the chance that Thailand would have to defend itself against a formal challenge to the AER in the GATS, but "we (the MFA) were unable to convince the Cabinet on this point."

6. (SBU) Krit noted that the Cabinet-approved provides only a temporary remedy to the AER/services investment issue and wondered aloud what might happen should our efforts to find acceptable language fail. In reply, the Ambassador suggested that it would be best for now to concentrate our efforts on finding common ground.

Background

7. (SBU) The AER's preferential provisions for U.S. investors are a prima facie inconsistency with the MFN

provisions of the WTO GATS. In recognition of this, upon Thailand's 1994 accession to the GATS, the country took a ten-year derogation period for the AER, a period that ended January 1, 2005.

18. (SBU) In December, 2004, the RTG sent a diplomatic note to the USG, advising that it was withdrawing from two articles of the AER in order to comply with WTO rules. In response to the diplomatic note, the USG insisted that a party could not simply withdraw unilaterally from certain obligations of a treaty and, therefore, we considered the AER to remain valid. The RTG offered to continue to comply with the terms of the AER if the USG would agree to an exchange of diplomatic notes pledging USG support if a third party brought Thailand to WTO dispute resolution for violation of WTO rules. In parallel with our FTA talks, language for the notes was agreed to by the negotiators. After several months of delay, the Foreign Minister and Deputy Prime Minister for Foreign Affairs both agreed to the notes, and it was presented to Cabinet for final approval. The formal exchange of letters (probably between FM Kantathi and Secretary of State Rice) was envisioned as a bridging mechanism between the expiration of Thailand's GATS derogation and the coming into force of the FTA, allowing the conferral of AER benefits without interruption.

19. (SBU) Embassy officials belatedly (and anecdotally) learned in early January that applications for US services investments under the provisions of the AER were no longer being approved by the Ministry of Commerce. After initially denying that this was the case, MFA officials eventually confirmed this information. Contrary to expectations, we were told, Commerce Minister Somkid had objected to the proposed language in the "comfort letter" on the grounds that it did not provide sufficient cover for Thailand in the event of a WTO challenge.

110. (SBU) The presence of key USG officials in Chiang Mai, Thailand, in January to participate in the FTA talks afforded the opportunity for several exchanges on the AER issue with RTG officials. While inconclusive, those exchanges served to inform and sensitive the RTG (particularly MFA) that this was a serious problem that jeopardized the FTA process. We believe these exchanges laid the groundwork for the FM's "turning point" January 18 call to AUSTR Barbara Weisel.

111. (SBU) Comment: While the agreed arrangement provides a temporary fix to our immediate problem and as such is welcome, this incident serves as a reminder that the AER's long term prognosis is terminal. Key provisions of the AER are inconsistent with contemporary trading arrangements to which both Thailand and the US are signatories. Our best hope for continuing our preferential rights in services investments in Thailand is the conclusion of an FTA. If the FTA falters, U.S. services investment rights in Thailand are likely to revert to the GATS and its MFN provisions. Prospective U.S. services investors need to be aware of this fact.

BOYCE